No. 2692

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION, a Corporation, THE ARIZONA TRUST COMPANY, a Corporation, and SIMS ELY, as Receiver of the Arizona Mutual Savings and Loan Association and as Receiver of the Arizona Trust Company,

Appellees.

Reply Brief of Appellant.

Upon Appeal from the United States District Court for the District of Arizona.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Solicitors for Appellant.

Bower Co., Phoenix

No. 2692

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION, a Corporation, THE ARIZONA TRUST COMPANY, a Corporation, and SIMS ELY, as Receiver of the Arizona Mutual Savings and Loan Association and as Receiver of the Arizona Trust Company,

Appellees.

Reply Brief of Appellant.

Upon Appeal from the United States District Court for the District of Arizona.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Solicitors for Appellant.

Bower Co., Phoenix

In the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR A. KLINE,

Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION, a Corporation, THE ARIZONA TRUST COMPANY, a Corporation, and SIMS ELY, as Receiver of the Arizona Mutual Savings and Loan Association and as Receiver of the Arizona Trust Company,

Appellees.

———

We cannot agree with appellees that (quoting page 1 appellees brief) "this is an action growing out of the status of the mortgages given by stockholders of the Arizona Mutual Savings and Loan Association as security for loans made by it to them as stockholders." The only loan of the character mentioned is the so-called Wardlop note (Transcript p. 68); the Booker, Smith, Jennings, Alger and Phoenix Construction and Supply Company notes are in ordinary form. The record does not show these as loans to stockholders, and as this was not a building and loan association but an association which loaned money generally, there is no basis for the assumption. (Transcript, pp. 71-82).

On page three, appellees say:

> "On March 2nd, 1912, when the arrangement between Kline and the officers of the Loan Association and Trust Company was, as he says, consummated,

the Loan Association was insolvent; this was determined in the suit of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association."

We have read the decree itself as printed in appellees brief (pages 22-26) and we fail to find in the decree any judgment that the Loan Association was insolvent at the time of the Kline transaction or at any other time. The only time the court uses the word "insolvent" is in its opinion (printed as a part of the decree) where it says:

> "It is the opinion of the Court that the decree of Februray 27th, 1913, which attempts to vest the title of the assets of the Loan Association in the Trust Company is beyond the issues of the case made by the bill and answers and intervening petitions, it being shown by the pleadings that the Loan Association was insolvent when it did so and that it received no legal consideration for such transfer." (Page 24, brief).

The importance of this point is manifest. The fact is (apart from any question of decree) that the Loan Association was not insolvent when Kline sold his stock in March, 1912. Kline was and is entitled to the presumption of solvency.

> Warren v. Robinson, 70 Pac. 989; 25 Utah 205;
> Jensen v. Montgomery, 80 Pac. 504; 29 Utah 89;
> German Security Bank v. Columbia Co., 85 S. W. 761; 27 Ky. Law Rep. 581.

If insolvency was in issue, which it was not, the decrees (even if considered) do not establish insolvency.

We earnestly contend that to deprive Kline of his collateral on the theory of the insolvency of the Loan Association would be to predicate a judgment upon a misapprehension of the record.

We point out the colloquy between counsel and court (p. 85, transcript):

> "By the Court:—Had the stock matured at that time?
>
> By Mr. Lewis:—That is the purport of the letter, that it would mature at that time, January, 1912. It was simply explanatory of how Mr. Kline came to Phoenix.
>
> By the Court:—I understand. In the meantime did the association become insolvent?
>
> By Mr. Lewis:—No. If your Honor please."

———

Appellees say (bottom page 7, brief): "Moreover he (Kline) had actual notice of the pendency of the (Clark) suit at the time when he claimed to have changed his status from that of a stockholder to creditor (Transcript of Record, Fol. 78) etc."

We do not so read the record. Kline sold his stock in March. The note and collateral was placed in escrow then. (Transcript, p. 64). The collateral was approved in April. (Transcript, p. 67). The Clark suit was commenced in July. Kline's talk with Smith when he first heard of the Clark suit was in August. (See pages 99-103, Transcript—being same as appellees' folios 78-82).

The authorities cited by appellees are cases dealing with Building and Loan Associations. The Arizona Mutual Savings and Loan Association is not a Building and Loan Association. It is a savings and loan association, incorporated under the provisions of Chapter Four, Title XII, Revised Statutes of the Territory of Arizona, 1887. In the absence of any proof that it is a building and loan association the law peculiarly applicable to building and loan associations is not in point.

———

But if the building and loan cases are to be considered, the case of

Standard Savings & Loan Assn. v. Aldrich, 89 C. C. A. 646; 163 Fed. 216, with note.
Id. 20 L. R. A. (N. S.) 393.

is readily distinguished on the facts.

That is a case where suit was brought to recover on a loan made direct to a building and loan association for the purpose of paying withdrawing stockholders, the loan association being insolvent. The court held that the corporation had no power to borrow for such purpose and the lender, having knowledge of the purpose had constructive knowledge of the want of power and could not recover.

In the case at bar the Trust Company, an independent corporation, offered to purchase Kline's stock. Counsel for appellees concedes that he had a perfect

right to sell his stock to the Trust Company. (Middle page 8, appellees' brief). He took as collateral, notes negotiable in character, the title to which was, on its face, in the Trust Company. Any defect in the Trust Company's title to these notes was dependent upon the state of facts under which the Trust Company acquired title. The case cited does not say or attempt to say what the rights of the taker of collateral under such circumstances would be.

The difficulty with the entire case as made by the appellees is that it is based upon assumptions.

Appellees assume that the Loan Association is a building and loan association. There is neither the charter nor the by-laws in the record and the fact is, it is not such an association. (Appellees' brief, p. 16).

Appellees assume that at the time of the sale of the Kline stock to the Trust Company the Loan Association was insolvent (pp. 5, 7, 13, 19, appellees' brief). All the evidence is to the effect that it was solvent and the presumption is that it was solvent. (Transcript, pp. 90-91).

Appellees assume that the decrees in the Clark case established insolvency. There is no decree establishing insolvency. (Page 7, appellees' brief—compare decree p. 25, Appellees' brief).

Appellees assume that Kline had notice of the pendency of the Clark suit at the time he sold his stock to the Trust Company (appellees' brief, p. 7). The fact

is he sold it in March and the Clark suit was commenced in July (p. 64, transcript).

Appellees assume that Kline held this stock (what stock?), by his own statement from March 2, 1912, without setting up a claim to it, until July 13, 1914 (p. 9, appellees' brief).

The fact is that the transaction was an escrow held by the Valley Bank concluded before the Clark suit was commenced. (pp. 63-67, Kline testimony; p. 102, complaint; pp. 3-5 admitted by answer p. 14, Transcript).

Appellees assume that "Kline knew that the Trust Company was attempting to buy the stock and did buy his stock in the *insolvent* Loan Association." (p. 19, appellees' brief). This is directly contrary to the evidence of Kline, the only witness. (pp. 90-91, transcript).

Appellees assume that Kline knew the notes offered to him as collateral for the notes given by the Trust Company to secure the purchase price of his stock were given by stockholders of the Loan Association and were assets of the Loan Association. (page 19 brief of Appellees

Only one of the notes was given by a stockholder; the Wardlop note (transcript, p. 68).

Kline did not know that the collateral was owned by or assets of the Loan Association. The only evidence in the record is to the contrary. (Transcript, pp. 92-95).

Appellees assume, without supporting their position by argument or authority, that the Clark decrees are properly in evidence and that the trial court was cor-

rect in holding Kline bound thereby. Kline's interest in and title to the collateral involved was initiated prior to the commencement of the Clark litigation and we confidently urge that this being so, Kline is not bound by these decrees, and that the court erred in considering them.

We submit that the decree herein should be reversed and judgment entered in accordance with the prayer of the bill.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
Solicitors for Appellant.

Service of the foregoing brief is admitted this 11th day of February, 1916.

GEORGE J. STONEMAN,
Solicitor for Appellees.